PW5, who according to the defence was at this meeting, categorically denied that she was ever present at the discussion or ever received the $900 as alleged by the defendant. She did, however, admit meeting the defendant in March 1977 when the defendant offered to give up the said land for the sum of $30,000 and also executing immediately afterwards the document P6 dated 25 March 1977 whereby she agreed to sell the said land to the plaintiffs for the sum of $12,000.

If the defendant's version is true that the said land was actually sold in 1959 to him by the deceased (acting presumably as agent of PW5) how is it that he allowed a proper residential building to be erected on the said land in 1966 without much ado and accepted a 'condition' proffered by PW5 that compensation would be paid to her should she have to demolish the building if required to do so by him. I find this so-called condition rather odd and inconsistent with his claim of ownership of the said land. Further if there had really been an outright sale of the said land to the defendant why did he not take any steps to enforce his rights until 5 March 1979 when he caused his solicitors to issue the letter demanding delivery of the title deed only after receiving the notice to quit P1 from the plaintiffs' solicitors. And how does he explain his instructing another firm of solicitors to send a second letter P2 dated 24 April 1979, ostensibly a second reply to the same notice to quit, in which it was stated that the consideration for the purchase of the said land was $500 instead of $900? For all the above reasons, I find on a balance of probabilities that the defendant has not established that he originally took possession of the said land as purchaser as alleged in his pleadings.

Quite apart from the actual facts of the transactional relationship between the defendant and the deceased, I am of the view that even as a matter of law having regard to the defendant's version of the facts that the sale of the said land by the deceased, even if he had the authority to do so on behalf of PW5, would have been, to borrow the words of Thomson J (as he then was) in *Hee Cheng* v *Krishnan*,[1] 'unlawful by reason of s 24 of the Contracts Act 1950 as being of such a nature that if permitted would defeat the provisions of any law and that it is therefore by reason of that section void'. At the time when the alleged sale was to have taken place, namely, on 10 April 1959, the following restrictions in interest appeared in the notice of approval of application:

(i) The land hereby alienated shall not be transferred, nor shall it be leased, tenanted, charged or otherwise disposed of, without the prior written approval of the Collector of Land Revenue, such approval shall in the case of transfer lease or charge be endorsed on the memorandum of transfer, charge or lease.

(ii) ...

(iii) The above restriction in interest shall cease to be operative after the expiration of ten years from the date of the registration of this title or from such prior date as may be approved by the Ruler-in-Council.

Restriction (i) was certainly in existence in 1959 soon after PW5's application for the said land was approved and as no prior written approval of the Collector of Land Revenue was shown to have been obtained, the alleged sale of the said land was, in my view, illegal and of no effect.

Accordingly, I find that the defendant is a licensee at will of the said land and the other two issues for determination would call for no consideration.

In the event, I make an order that the defendant and those claiming under him do deliver up vacant possession of the said land within three months hereof. With regard to the plaintiffs' claim for damages, I agree with counsel for the defendant that the plaintiffs were mere transferees of the QT from their sister PW5 as I am of the view that the transfer was effected and the plans were drawn up in respect of the proposed building on the said land for the sole purpose of fortifying the case against the defendant. I do not think this is an appropriate case for damages to be awarded. That said, I must also say that I do not think that the transfer can in any way be considered to amount to an exercise which was fraudulent or an act 'to cheat and deprive' the defendant of the said land.

I order that costs be paid by the defendant.

Order accordingly.

Solicitors: *Baharuddin Bernatt, Tan & Ker; Gill & Tang.*

Reported by *Wong Kim Fatt*

Teck Yow Brothers Hand-Bag Trading Company v Maharani Supermarket Sdn Bhd

HIGH COURT (JOHOR BAHRU) – COMPANIES WINDING-UP NO 42-23 OF 1987
ABU MANSOR J
15 AUGUST 1988

Companies and Corporations – Winding up – Application for winding up opposed by creditor – Whether company unable to pay debts and ought to be wound up – Notice – Failure to comply with rules – Winding-Up Rules, r 24 – Companies Act 1965, s 218(2)(a), (b) & (c)

This was an application by the petitioner for the winding up of the respondent company. A creditor, the landlord of the premises, objected to the application. It was alleged that the company was indebted to the petitioner for $4,093. The objector had levied distress after the commencement of the petition for winding up and the distress realized a sum of $61,000. The amount due to the objector was $45,000.

Held, granting the petition:

(1) The objector had interest in the subject matter of the winding up and has locus standi.

(2) The evidence in this case is overwhelming that the respondent company is unable to pay its debt. The petitioner has proved to the satisfaction of the court that the respondent was unable to pay its debt and in so determining the court is allowed to do so by taking into account the contingent and prospective liabilities of the respondent company.

(3) The notice under s 218(2)(a) of the Companies Act 1965 is in the circumstances unnecessary and the court ordered that it be dispensed with as the petition is not wholly founded on s 218(2)(a) of the Companies Act 1965. Section 218(2)(a), (b) and (c) are mutually exclusive, and on the facts and in the exercise of its discretion, a company can be wound up by the court on any of the grounds (a), (b) or (c).

(4) In this case the petitioner has published in the gazette and once in two local newspapers and this was sufficient publication.

(5) As the company is unable to pay its debts there is sufficient ground to enable the court to exercise its discretion to order winding up of the company. As it also appeared that the directors of the company had absconded and a provisional liquidator had already been appointed it is just and equitable that the company be wound up.

Cases referred to

1 *Re Welsh Brick Industries Ltd* [1946] 2 All ER 197 (refd)
2 *Re NKM Holdings Sdn Bhd* [1985] 2 MLJ 390 (folld)

Legislation referred to

Companies Act 1965 ss 218, 219, 224
Winding-Up Rules r 24

Ong Ban Chai for the petitioner.
TS Chong for the provisional liquidator.
RA Kumar for the opposing creditor.

Cur Adv Vult

Abu Mansor J: This petition for winding up came up for hearing on 19 July 1988 and at the end of argument I reserved judgment to 15 August 1988. My judgment is as follows.

Teck Yow Brothers Hand-Bag Trading Company ('Teck Yow'), the petitioner, is applying to wind up Maharani Supermarket Sdn Bhd ('Maharani'). Ban Heng Hong Sdn Bhd, a creditor of Maharani, objects to the application for winding up.

Maharani was incorporated on 24 January 1978 with an authorized capital of $1,500,000 divided into 1,500,000 shares of one dollar share each. The amount of paid-up capital of the company is $793,203. Apart from the other objects set out in Maharani's memorandum and articles of association, its objects are to carry on the business of general merchants of all kinds from preserved provisions to all goods or articles of every description which may seem to Maharani capable of being conveniently carried on to enhance the value or render profitable any of Maharani's property or rights. It was by virtue of the purchase price of goods sold and delivered to Maharani that the petitioner herein alleged that Maharani is indebted to the petitioner for $4,093. The petitioner further alleged that the company is unable to pay its debt and in the circumstances, the petitioner says it is just and equitable that the company be wound up. Hence petitioner Teck Yow prays for an order that the company be wound up, that the Official Receiver (at the hearing amended to M/s Roland Chung) be appointed the provisional liquidator of Maharani and also prays for the usual further consequential orders.

The petitioner's application was supported by the affidavit of the petitioner's solicitor Mr Ong Ban Chai who affirmed that the petition had been duly advertised by insertion of such advertisement (OBC1) once in *New Straits Times* on 16 May 1987 and once again in *Sin Chew Jit Poh* on 18 May 1987. Mr Kumar for the opposing creditor Ban Heng Hong, however, disputed that the advertisement is good advertisement. The petition has also been duly gazetted on 9 April 1987.

At the outset of the hearing Mr Ong Ban Chai for the petitioner raised a preliminary point. He contended that creditor Ban Heng Hong had no locus standi. Petitioner's counsel contended that creditor Ban Heng Hong is not a mere creditor but one by virtue of being a landlord of Maharani who had carried out distress on the property of Maharani on 17 March 1987 after the present petitioner presented their petition on 5 March 1987. Counsel further contended that if the petitioner is successful in his application for a winding up the position under s 219 of the Companies Act is that the Maharani winding up commences on the date of the presentation of the petition. He submitted that under s 224 of the Companies Act, therefore, any attachment after the commencement of the winding up by the court shall be void. Hence he says creditor Ban Heng Hong has no locus standi to oppose this present petition.

Mr Kumar, however, submitted that he has locus standi. He conceded that if the winding up is successful then no distress could be effected by his client since the distress was after the commencement. However, if on the other hand, the winding up is bad, and he intends to submit it is so, then his distress is valid. As a matter of fact the distress that was carried out realized $61,000. That amount is deposited with the High Court Registry in Muar. What is due to his client is some $45,000. If the winding up is held to be invalid by the court his client would have priority. In either case Mr Kumar's client has got definite interest in the outcome or the decision of the court in the matter of Maharani's winding up. I rule that Mr Kumar's client has interest on the subject matter of the winding up and in my view he has locus standi.

On the petition for winding up, Mr Ong Ban Chai anticipated and answered the point raised by the managing director of Ban Heng Hong, Mr Chua Su Yin, in cl 7 of his affidavit affirmed on 9 June 1987 that the petitioner failed to serve the statutory notice under s 218(2)(a) of the Companies Act 1965 prior to the presentation of the petition and failed to prove that Maha-

rani was unable to pay its debt at the time of the presentation of the petition. In answer, petitioner's counsel says even assuming that there is non-compliance with the required notice it can be covered by s 221 of the Companies Act by the court dispensing with such a notice. Under s 218(2) of the Act since the petitioner is proceeding under s 218(1)(e) and (i) and s 218(2)(b) and (c) relying on evidence that the company is unable to pay its debt, there is therefore no need for the petitioner to issue the statutory notice as the petitioner is not relying on that presumpton. The evidence that Maharani is unable to pay its debt is all there. There is a list of supporting creditors filed. A provisional liquidator had already been appointed on 16 April 1987; the goods of Maharani seized had all been sold in March 1987.

Petitioner's counsel therefore submitted that there are only two issues before the court. One was whether there was a bona fide dispute as to the existence of the debt and secondly, is Maharani able to pay its debt. If the answers in both cases are in the negative then the company should be wound up. If the court is inclined to give the order, counsel applied that Roland Chung be appointed as the liquidator. Counsel cited *Re Welsh Brick Industries Ltd.*[1]

Mr Kumar for Ban Heng Hong founded his objections to the winding up on two grounds, one of which was whether the petitioner had satisfied the court that Maharani was unable to pay its debt. He contended that a company is unable to pay its debt when a notice had been sent to it giving it 21 days to pay its debt. Since the petitioner did not avail himself of s 218(2)(a) there was therefore no evidence that Maharani was unable to pay its debt. According to Mr Kumar it was important to remember that there was execution and Maharani was able to pay its debt. He contended that it was at the time of the filing of the petition that it must be shown that Maharani was unable to pay its debt. As to the requirement that the court must look into the contingent and prospective liabilities of the company Maharani in order to be satisfied that it was unable to pay its debt, he submitted there is no such evidence. He also submitted there is also absence of grounds for winding up Maharani on the just and equitable ground. Since the petitioner is unable, so Mr Kumar contends, to prove that Maharani is unable to pay its debt, the court could in no way remedy the situation and dispense with the s 218 notice.

Mr Kumar's other ground is that the winding-up order should not be granted as the petitioner had failed to comply with r 24(a) of the Winding-Up Rules requiring publication twice at least in two local newspapers. He submitted that this also made the petition bad and therefore ought to be dismissed.

After hearing arguments I came to the conclusion on the facts before me the sole issue is whether Maharani is unable to pay its debt and therefore should be wound up. On such examination of the facts the evidence is overwhelming that the respondent Maharani is unable to pay its debt. I find as a fact that the petitioner has proved to my satisfaction that Maharani was unable to pay its debt and in so determining I am allowed to do so by taking into account the contingent and prospective liabilities of the company Maharani. As has rightly been pointed to by the petitioner's counsel as per encl 63, Maharani's debt according to the list of supporting creditors amounts to $100,000. To this must be added the amount he owed the opposing creditor, his landlord, $40,000. The distress realized only $61,000. Because of this amount it has never been really disputed by the opposing creditor that Maharani is insolvent but what the objection consists of is that there was sufficient to pay Ban Heng Hong and by that yardstick Maharani is able to pay its debt and we shut our eyes to the other creditors in the list. To take that view is in my view unreasonable and unjust.

As for the contention that no proper notice under s 218(2)(a) of the Act has been given I find in this case that the notice is in the circumstances unnecessary and I order that it be dispensed with as the petition is not wholly founded under s 218(2)(a) of the Companies Act. I am of the view that s 218(2)(a), (b) and (c) are mutually exclusive and on the facts and in the exercise of its discretion a company can be wound up by the court on any of the grounds (a), (b) or (c).

As regards the allegation that the petitioner failed to comply with r 24 of the Winding-Up Rules as to publication in the gazette and two local newspapers, I find that the petitioner has published in the gazette and once in two local newspapers and this was sufficient publication applying the case of *Re NKM Holdings Sdn Bhd.*[2]

With all the objections disposed of and my finding that Maharani is unable to pay its debt, I hold that there was sufficient ground to enable me to exercise my discretion to order winding up of Maharani. Apart from this consideration there was also the statement from the Bar of the petitioner's counsel that the directors of Maharani have already absconded. I accept that statement. As Maharani is without its directors to act for them and that a provisional liquidator had already been appointed and my finding that it is unable to pay its debt on that ground it is just and equitable that Maharani be wound up. I do make that order and consequentially order that M/s Roland Chung be and is hereby made liquidator of Maharani with reasonable costs to the petitioner and the other supporting creditors to be taxed.

Order accordingly.

Solicitors: *Ong Ban Chai & Co; TS Chong & Co; Varughese & Co.*

Reported by *Prof Ahmad Ibrahim*